IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

APPEAL FROM ORDER NO.871 OF 2004
IN
NOTICE OF MOTION NO.2987 OF 2004
IN
B.C.C.C.SUIT NO.6175 OF 1999

M/s.G.Nahar Group of Concerns).. Appellant

Versus

Anil C. Nayak).. Respondent

Mr.Vinod Desai for the Appellant.

Ms.Sumedha Rao for the Respondent.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 11TH OCTOBER 2004

P.C.:

. The Notice of Motion taken out by the Respondent herein-original Defendant has been allowed and the ex-parte decree has been set aside. It appears that on 20th February 2003 when the Suit was decreed, nobody appeared for either side at 11.00 a.m. when the matter was called out. It appears that on the same day an Advocate appeared for the Plaintiff and requested that under Order 9 Rule 8 of the Civil Procedure Code the Suit be restored to file as it was mentioned on the same day. It appears that on that day, the trial Court has not only restored the Suit to file but has also decreed the Suit.

Rule 4 of Order 9 of the Civil Procedure Code requires the trial Court to restore a Suit if it has been dismissed and the Court is satisfied that there was sufficient cause for the Plaintiff to remain absent. However, it is further stipulated that the Court shall make an order of setting aside the dismissal and shall appoint a date for proceeding with the Suit. The trial Court, it appears, has proceeded with the Suit on the same day without notice to the Defendant.

2. Thereafter the Defendant on learning of the Suit having been decreed has applied for setting aside the decree by filing Notice of Motion. The Notice of Motion has been allowed. The Plaintiff claims that this Motion has been allowed without there being a prayer for condoning the delay in taking out the Motion for setting aside the decree almost a year after the decree was passed. Reliance is placed on the judgment of the Supreme Court in the case of Smt.Ram Kali Devi cs. Manager, Punjab National Bank, Shamshabad and others, (1998) 9 SCC 558, where the Apex Court has held that the merits of the case cannot be looked at without condoning the delay and it is necessary that the delay be condoned before the trial Court can proceed with the Suit. In the present case, it appears that after the order was passed on the Notice of Motion, setting aside the ex-parte decree, the Written Statement has already been filed by

the Respondent. Furthermore, the entire procedure adopted by the trial Court of decreeing the Suit without giving notice to the Defendant, appears erroneous to me. I see no reason to interfere with the order of the trial Court. Appeal from Order dismissed.

3. In view of the disposal of the Appeal From Order, nothing survives in Civil Application No.1181 of 2004 and the same is disposed of accordingly.